

Board of Inquiry Decision under the ONTARIO HUMAN RIGHTS CODE

Laura Waroway, complainant v. Joan and Brian's Upholstering & Interior Decorating Ltd. and Mr. Brian Pigott, respondents

Date of Complaint: January 23, 1990, amended August 13, 1991

Date of Hearing: December 17 and 20, 1991

Date of Decision: January 8, 1992

Place: Hamilton, Ontario

Before: A.F. Bayefsky

Appearances by: Ms. Catherine Bickley, Counsel for the Ontario Human Rights Commission, Vince Tortis, Counsel for Mr. Brian Pigott and Brian's Upholstering & Interior Decorating Ltd.

This inquiry concerns a complaint by Ms. Laura Waroway against Joan and Brian's Upholstering & Interior Decorating Ltd. and Mr. Brian Pigott. The complaint alleges that Mr. Pigott, one of two directors of Joan and Brian's Upholstering & Interior Decorating Ltd., and Ms. Waroway's employer, infringed Ms. Waroway's right to freedom from harassment in the workplace because of sex contrary to sections 6(2) and 8 of the Ontario Human Rights Code, 1981, c. 53 as amended. The complaint further alleges that Mr. Pigott infringed Ms. Waroway's right to freedom from sexual solicitation or advance contrary to paragraphs 6(3)(a) of the Code, and carried out a reprisal by firing Ms. Waroway contrary to paragraph 6(3)(b) of the Code.

The Facts

At the time of the events relating to this complaint, Laura Waroway was 20 years old. This was her first full-time job. Prior to obtaining this job, Ms. Waroway had studied accounting at Mohawk College for two years. The interview was obtained through the Unemployment office which listed the opening, describing it as a bookkeeper. Ms. Waroway phoned and arranged the interview herself. She was interviewed by Mr. Pigott and Ms. Joan Bitel. During the interview she made clear that her qualifications for the job were limited to her schooling. She was offered the job at the time of the interview and commenced work some days later, on November 27, 1989. Her pay was to be \$315.00 per week.

Ms. Waroway remained employed for 3 days. At the end of the

days, November 29, her employment was terminated by Mr. Pigott. Approximately one and a half weeks later she returned to the business with her mother. She remained in the car and her mother went into the building and collected her pay for the three day period, which amounted, with deductions, to \$171.19.

At the time of the interview Ms. Waroway was advised that it was a small business and that her duties would extend beyond bookkeeping when she was not busy to include other tasks such as helping with upholstering and delivering orders. Her tasks were also to include answering the phone and filing. At any one time the business had approximately 3 employees, two upholsterers and a bookkeeper, in addition to the two employers Mr. Pigott and Ms. Bitel.

With respect to the issue of sexual harassment and the behaviour of Mr. Pigott toward Ms. Waroway, the complainant's testimony was as follows.

On her first day on the job Mr. Pigott told "dirty jokes" in the lunchroom at the first break. The two upholsterers and Joan Bitel were present along with the complainant and Mr. Pigott. The complainant said little in response to the "jokes". She blushed and Mr. Pigott made various comments about her blushing. After the break work resumed. When Joan Bitel left the office shortly after mid-day Mr. Pigott asked the complainant to accompany him. He stated he wanted to show her something. Mr. Pigott's living quarters were located in the same building as the business and Mr. Pigott and the complainant walked to these quarters and entered

them. Mr. Pigott's living quarters contained a television and video recorder. Mr. Pigott told the complainant "I bet you can't even last ten minutes", whereupon he turned on the V.C.R., which had been pre-set, and left the room. The movie was of "lesbians making love fully undressed" and "went on for about seven minutes". The complainant stated that she remained in the room during this time, watching shocked for the first minute and a half and then looking out the window. She stated that she remained in the room because she was "stunned". Mr. Pigott then re-entered the room. He said she was surprised that she was not blushing as much as he thought she would and he asked her how she liked the movie. When she stated that she did not like it, he said he had other videos of men she could watch. She responded, no thank you and they left the room. On the way back to the office he "reached out to put his hand on her shoulder and said, how would you like it if I took your left boob and squeezed it and squeezed it and squeezed it until it fell off?" He reached out to touch her and she backed away. They continued to walk back to the office. At the office Mr. Pigott asked her whether she had "fucked before", whether she liked oral sex and other questions about her sex life.

The second day the complainant testified that she returned to the job because she needed the job and the money. Early in the day the complainant was helping the upholsterers remove nails from the furniture and when she requested a pair of gloves from Mr. Pigott he told her that he would not want her hands "to get rough for giving hand jobs". The complainant and Mr. Pigott alone then went

out on deliveries together in a van. The complainant helped Mr. Pigott lift furniture into homes. Mr. Pigott told the complainant that in between deliveries she "could play with herself and he would watch". She stated she remained silent. He made further sexual comments such as "it really turns him on to watch a woman play with themselves"; "he likes to eat good pussy"; "he likes it all over his face". When Mr. Pigott and complainant returned to the office the complainant's job consisted of a small amount of filing and assisting with the re-upholstering.

The third and last day on the job the complainant testified that nothing of a sexual nature took place. At the end of the day Mr. Pigott told her that her services were not needed and that she could take her coffee mug and leave. He gave her no explanation and she asked for none.

She stated that she drove to her boyfriend's house, started to cry and for the first time told anyone about the events of the last three days. She also told her family later that day what had happened during those three days.

Two former female employees of Mr. Pigott, who had also served as the bookkeeper, that is in the same job as the complainant, testified on behalf of the Commission concerning their experiences with Mr. Pigott. No objection was made to the admissibility of the evidence of these two employees.

The first was Maryanne Colacci. Ms. Colacci was 34 years old when she began to work for Mr. Pigott. She worked there from June 1988 to September 1989. Her job was advertised as one of

bookkeeper. When she commenced her employment she had had approximately five years experience as a bookkeeper. In addition to bookkeeping, she also went on deliveries with Mr. Pigott and assisted with re-upholstering. She testified that while doing the latter Mr. Pigott would make comments in front of customers such as "this girl gives an excellent hand job or blow job". She stated that these terms in fact referred to woodworking skills, but that although she and Mr. Pigott knew this, the customers did not and Mr. Pigott was aware of the customer's perception. She was therefore very embarrassed in front of them. Mr. Pigott also often made more direct sexual comments in the context of her re-upholstering work. He would state that her work "would give her a good strong hand for giving her boyfriend a hand job". She testified that Mr. Pigott often asked her about her sex life with her boyfriend. Her response was to blush and turn or walk away from the questions, which she did not answer. On one occasion, after working at the business for approximately a year in the late spring of 1989, Mr. Pigott told her to accompany him to his living quarters. He told her to sit down and watch a movie, which he proceeded to put into the V.C.R.. He then left the room. The movie was a "porno flick" about "two naked women and a naked man". When Ms. Colacci realized what she was watching she immediately walked out and went back to work. She said nothing to Mr. Pigott about the incident and he said nothing to her. She stated that she remained on the job because she needed the work, having recently separated from her husband. Mr. Pigott fired her in September of

1988 after objecting to the manner in which she had handled an allegedly overdue account.

The second former employee to testify was Ms. Hope Meek. Ms. Meek was 22 years old when she began to work for Mr. Pigott. She was employed from March 1990 until July of 1990. Her job was described in the newspaper advertisement which she answered as general office clerk. Her job consisted of bookkeeping, filing, answering the phone and assisting with re-upholstering. She testified that Mr. Pigott's conversations with her were often of a sexual nature. On one occasion he asked her to come to his living quarters to see his video equipment. While there he told her that he could watch pornographic films on the television and he described some of what he would see. He did not ask her to view any such film. She remained in the living quarters for only a few minutes. In response to his sexual comments and his remarks about the pornographic films, Ms. Meek testified she would tend to look down at the ground, say nothing and try to change the subject. She was fired by Mr. Pigott for her handling of some work concerning the preparation of separation papers.

Mr. Pigott was approximately 57 at the time of Ms. Waroway's employment. He testified that he knew her only qualifications for the job as bookkeeper consisted of her schooling. He agreed that he did make "dirty jokes" to the complainant. He stated that she did not indicate to him that these "jokes" were offensive to her. He also testified that he would have spoken of "blow jobs" and "hand jobs" to the complainant, but he gave contradictory testimony

as to whether these remarks were intended to be of a sexual nature. He also testified that his V.C.R. was not in his living quarters at the time of Ms. Waroway's employment because it was being repaired; he added however, that his satellite dish could get "x-rated movies" throughout the day, and these were available only by pushing a button. He also testified that he did ask Ms. Waroway to see his video/stereo equipment, which were in his living quarters, but that he did not show her any pornographic films. He stated that he fired her because on her third and last day on the job, a Wednesday, she had prepared the payroll figures for that week and had used "white-out" or liquid paper on the payroll book to cover over mistakes. In his words, he told her that her work was "no sucking good."

The complainant denied having made any entries, or corrections, on the payroll book during her employment at all.

Mr. Pigott testified with respect to the testimony of Ms. Colacci that he did refer to "blow jobs" and "hand jobs" but that these were technical terms in the upholstering business and that he did not intend them to be of sexual nature. He testified that he did make other jokes of a sexual nature to Ms. Colacci. With respect to the testimony of Ms. Meek, Mr. Pigott denied making any sexual comments to her. He agreed that he had taken Ms. Meek to his living quarters and simply showed her his video and sound equipment.

Mr. Pigott indicated by his own testimony that he told "dirty jokes" to the complainant during the course of her employment;

that he used language in the first few days of her employment that a person unfamiliar with the business would understand as being of a sexual nature; that he invited the complainant to his living quarters; that he was specifically conscious of the fact that his video/stereo equipment could readily obtain pornographic material at the time. He denied actually showing such pornographic material to the complainant and all other sexual comments over the course of her first two days employment. I find that his denial of the remainder of the complainant's allegations was not credible. Along with the testimony of the complainant, the testimony of the other two witnesses, employed shortly before and shortly after the complainant, indicates that Mr. Pigott engaged in a similar pattern of activity with his lone female employees. He would often make remarks of a sexual and intimate nature in their presence and would invite them to his living quarters and either talk about pornographic films or show the films to them.

I accept the complainant's testimony with respect to remarks of a sexual nature, which involved suggestions that Mr. Pigott engage in sexual acts with her or in her presence, and which occurred during her first two days of employment both in the office and in the course of delivering furniture with Mr. Pigott. Furthermore, I find that the complainant's testimony that she did not do any work on the payroll records during her employment to be more credible than Mr. Pigott's testimony that she did.

Overall, the complainant delivered her testimony in a straightforward manner. On the other hand, Mr. Pigott's testimony was

often emotional and frequently appeared to be concocted. For example, Mr. Pigott made an emotional outburst when questioned about his alleged comments to the human rights officer who investigated the case. The human rights officer testified that Mr. Pigott had said to him "I should have shot the complainant...and then I wouldn't be having any of this trouble and I have the guns to do it." Mr. Pigott stated that the human rights officer was "a liar", although the human rights officer further testified that he subsequently related this comment of Mr. Pigott to the police in a letter he wrote during the course of the investigation. It seems unlikely in these circumstances that it is the officer who was lying. In response to his own counsel's questions concerning the writing in the payroll book, Mr. Pigott's confused testimony suggested that he was providing answers which he thought his counsel wanted him to give. His testimony that it was the complainant's use of "white out" or liquid paper in the payroll book which resulted in her firing is further undermined by the use of this correcting fluid which was made, not only in the week in which the complainant was employed, but also in a number of entries for the week following the complainant's employment.

No other reason, other than her alleged inability to fill out the payroll records which I have found not to have occurred, was given for the complainant's firing only three days after she began. Mr. Pigott was fully aware upon hiring her that this was her first full-time job and it seems likely that he would, in the normal course of events, have been prepared to test her bookkeeping skills

longer than this length of time. I find that at least one of the reasons for the complainant's dismissal was Mr. Pigott's view of the unsatisfactory nature of his relationship with the complainant resulting from his sexual approaches and comments.

The Law

The applicable sections of the Human Rights Code, 1981, Statutes of Ontario, 1981, c. 53, in this case are as follows:

s.6 (2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

(3) Every person has a right to be free from,

(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or

(b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

s.8 No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

s.9(f) "harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome;

Mr. Pigott, the complainant's employer, engaged in acts which constituted harassment in the workplace because of sex, contrary to s.6(2) of the Code. His comments and conduct of a sexual nature constituted a course of action; they were repeated in various forms over the first two of her three days' employment. His course of comment and conduct was vexatious to the complainant. She blushed; she was "stunned"; she "backed away" from him. And he

either knew or ought reasonably to have known that his actions were unwelcome. Although the complainant's response in general to his actions was to say little or nothing, she did tell him that she did not like the pornographic film, stated "no thank you" to suggestions to watch other such films, and physically withdrew from his attempt on one occasion to touch her. Mr. Pigott could also be expected to anticipate that the responses of a 20 year old woman on her first full-time job would very likely be muted in view of her inexperience. He himself testified that he thought of her as "so young" and "believed" her to be "a very naive kind of girl".

Furthermore, contrary to s.6(3)(a) of the Code, at least two acts of Mr. Pigott constituted a sexual solicitation or advance. The first such incident was his attempt to put his hand on her shoulder while stating "how would you like it if I took your left boob and squeezed it and squeezed it and squeezed it until it fell off?" The second such incident was his comment while alone in the delivery truck with the complainant that in between deliveries she "could play with herself and he would watch". As her employer these acts were clearly made by a person in a position to confer, grant or deny a benefit or advancement to the complainant. Furthermore, in addition to the fact that the complainant withdrew from his physical approach, Mr. Pigott knew or ought reasonably to know that his suggestion of physical harm would be unwelcome.

Since at least one of the reasons for the complainant's dismissal was Mr. Pigott's view of the unsatisfactory nature of his relationship with the complainant resulting from his sexual

approaches and comments, s.6(3)(b) of the Code was also violated. (See the Board of Inquiry decision of *Iancu v. Simcoe County Board of Education*, 4 C.H.R.R. 1983, D/1023, paragraphs 10593 to 10618, with respect to the issue of mixed motives.) The complainant's firing was, at least in part, a reprisal for her rejection of his sexual solicitations or advances.

Damages

Once a Board of Inquiry concludes that there has been a violation of the Code, section 40 confers a power on the Board to order a remedy.

Section 40(1)(b) of the Code states that the Board is empowered to direct the party having infringed the right of the complainant to make restitution for loss arising out of the infringement. Restitution in the context of lost wages means that the complainant should be placed in the position that she would have been in had she not been fired, taking into account the duty upon the complainant to mitigate her losses. In this case I find that the complainant's wages were \$315.00 per week gross salary. The complainant testified that she did not commence looking for another job for approximately one month after her experience at Joan and Brian's Upholstering. After that time her job search was reasonably diligent. She had a total income for part-time jobs of \$815.24 at the employer Kelly Girl + \$576.80 (8 days @ 7 hours per day @ \$10.30 per hour) at the employer Domglas (total \$1392.04) until she obtained full-time employment beginning April 23, 1990.

In view of the complainant's complete failure to look for work in the month following her employment of three days at Mr. Pigott's place of business, I find that this period of time should be excluded from the calculation on which the claim for lost wages should be based. From January 2, 1990 to April 20, 1990 her wages at Mr. Pigott's place of business would have amounted to 4 days in the first week (\$252.00) + (\$315.00 per week x 15 weeks = \$4725.00) for a total of \$4977.00 gross pay. Subtracting from that the amount she earned elsewhere gives the following sum for lost wages (\$4977.00 - \$1392.04) = \$3584.96.

The interest due on the damages for lost wages is (see *Hallowell House Limited*, [1980] O.L.R.B. Rep. Jan. 35; Practice Note No. 13, September 8, 1980, Ontario Labour Relations Board): (the date of payment - the mid-point of the lost wage period) x total wages for the lost wage period x Bank of Canada rate at the date of the complaint. In this case the rate of interest on January 23, 1990 established by the Bank of Canada was 12.14%. Assuming that damages will be paid within 30 days following this decision, that is by February 8, 1992, the amount of interest due in this case is:

(February 8, 1992 - (mid-point of the period January 2, 1990 to April 20, 1990)) x \$3584.96 x 12.14%, or ((February 8, 1992 - February 23, 1990) 1 year and 50 weeks (1.96)) x \$3584.96 x 12.14% = \$353.02.

Section 40(1)(b) empowers the Board also to award monetary compensation for mental anguish. In determining an appropriate

award for damages for mental anguish, I find it helpful to consider the factors used by previous Boards of Inquiry in sexual harassment cases. As summarized by the Board in *Torres v. Royalty Kitchenware Ltd. & Guercio* (1982), 3 C.H.R.R. D/858 (Ont. Bd. of Inquiry), these factors are:

- (1) The nature of the harassment, that is, was it simply verbal or was it physical as well?
- (2) The degree of aggressiveness and physical contact in the harassment;
- (3) The ongoing nature, that is, the time period of the harassment;
- (4) The frequency of the harassment;
- (5) The age of the victim;
- (6) The vulnerability of the victim; and
- (7) The psychological impact of the harassment upon the victim.

The harassment of the complainant in this case was primarily verbal rather than physical. The harassment began immediately, her first day on the job. It was aggressive in the sense that Mr. Pigott required her to watch a pornographic film (required in the sense that she would have had to remain in the room long enough to realize what she was being asked to watch), and he made the physically threatening suggestion that he "squeeze her boob until it fell off". The time period of the harassment was only 2 days of her 3 days of employment, but quite intense in frequency during this time period. The victim was only 20 years old and relatively vulnerable to her employer's actions in view of the fact that it was her first full-time job. She testified that she was "stunned"

at the time of the pornographic film incident, that she cried after her last day on the job, she had "a series of nightmares lasting a few days". She did not seek medical attention. I find that given the short, but intense period of harassment of a young, inexperienced individual that compensation for damages for mental anguish should be set at \$2,000. The infringement of the Code in this case has been wilful within the meaning of section 40(1)(b).

In addition, I order Mr. Pigott to issue a letter of apology to the complainant for the experience which she had while in his employ.

I also order Mr. Pigott to post a copy of the Human Rights Code in a prominent location on the premises of Joan & Brian's Upholstering and Interior Decorating Ltd. and at the premises of any business of which Mr. Pigott is a directing mind.

In consideration of future practices of Mr. Pigott and the respondent corporation, I further order that they inform the Human Rights Commission through its Hamilton office for the next three years each time a female employee leaves Mr. Pigott's employment or the employment of the respondent corporation. This information should be conveyed to the Commission within two weeks of the end of the employment of any female employee who works for Mr. Pigott or the respondent corporation and should include her name, address and telephone number.

Order

This matter coming on for hearing on the 17th and 20th days of December 1991, before this Board of Inquiry, pursuant to the appointment by Elaine Ziemba, Minister of Citizenship, dated November 4, 1991, in the presence of counsel for the Commission and Ms. Laura Waroway, the complainant, and counsel for the respondents, upon hearing evidence adduced by the parties and what was alleged by the parties, and upon finding that the complaint was substantiated by the evidence:

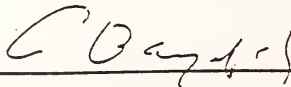
IT IS ORDERED THAT:

- (1) The respondent Mr. Pigott and the respondent corporation Joan and Brian's Upholstering & Interior Decorating Ltd. pay to the complainant the sum of \$3584.96 for lost wages; and
- (2) The respondent Mr. Pigott and the respondent corporation Joan and Brian's Upholstering & Interior Decorating Ltd. pay to the complainant the sum of \$853.02 as interest up to February 8, 1992; and
- (3) The respondent Mr. Pigott and the respondent corporation Joan and Brian's Upholstering & Interior Decorating Ltd. pay to the complainant the sum of \$2,000 for mental anguish caused as a result of the discriminatory act; and
- (4) The respondent Mr. Pigott send a letter of apology to the complainant for the failure to abide by the Human Rights Code in

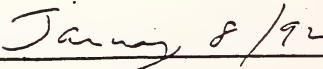
his treatment of her; and

(5) The respondent Mr. Pigott post a copy of the Human Rights Code in a prominent location on the premises of Joan & Brian's Upholstering and Interior Decorating Ltd. and at the premises of any other business of which Mr. Pigott is a directing mind; and

(6) The respondent Mr. Pigott and the respondent corporation Joan and Brian's Upholstering & Interior Decorating Ltd. inform the Human Rights Commission through its Hamilton office for the next three years each time a female employee leaves Mr. Pigott's employment or the employment of the respondent corporation, Joan & Brian's Upholstering and Interior Decorating Ltd. This information should be conveyed to the Commission within two weeks of the end of the employment of any female employee who works for Mr. Pigott or the respondent corporation Joan & Brian's Upholstering and Interior Decorating Ltd. and should include her name, address and telephone number.



Professor Anne Bayefsky



January 8, 1992